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CHARLES Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 470

WALTHER DAIRY PRODUCTS,
THE BORDEN COMPANY,
WISCONSIN SWISS AND LIMBURGER CHEESE PRODUCERS' ASSOCIATION,
CHEESE PRODUCERS' MARKETING ASSOCIATION,
WILD COOPERATIVE CHEESE COMPANY, and
STATE OF WISCONSIN, *Petitioners,*

vs.

KRAFT FOODS COMPANY, *Respondent.*

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent Kraft's brief argues that each of the two Questions presented is an attack on affirmed Findings of Fact made by the trial court. The findings of the lower courts cited in the Kraft brief completely fail to support, and in fact contradict, Kraft's contentions. The unchallenged testimony and admissions of Kraft's own witnesses also contradict these Kraft contentions.

As to Question 1:

Kraft's brief does not deny that the step of drying until dry the surfaces of the body of uncured Swiss cheese after brining and before sealing them is essential for obtaining, by the process claimed in the Stine patent, cheese which is marketable or edible. Kraft's brief (pp. 12, 13) argues that this step is incorporated in the Stine claims by reference to cheese of the Swiss type as the starting material, and that it did not need to be pointed out in the claims. This argument is based on the fallacious assertion that the essential drying step was a customary part of the old conventional wheel Swiss procedure. Kraft contends that the findings cited at pages 15 and 16 of its brief so hold.

This astounding assertion is directly contrary to Stine's unchallenged testimony, admitting and asserting that the essential drying step was part of his patented improvement and not a part of the conventional process. Also, the findings cited by Kraft do not support Kraft's contention, but on the contrary fully support the petitioners' statement.

Finding 26 (IV, 2851-2) holds that the definition of Swiss cheese given in column 1 of the Stine patent is a sequence of nine steps normally used in producing Swiss cheese by the conventional wheel process. The eighth step reads "Allow the body to drain and store in a cool room, for example 50° to 60° F., for a short time". Petitioners agree with this finding. Nothing in Finding 26 holds that, in the conventional process, the surfaces of the body were allowed, during the storing period referred to in step 8, to dry until dry, as fallaciously contended by Kraft.

The next finding cited by Kraft, Finding 54 (IV, 2859-60) begins with the following statement omitted from the quotation in Kraft's brief:

> "54. The patent teaches the following *modifications* of the subsequent steps of the conventional process:"

and subsections (a) to (f) list such *modifications*. Subsection (c), quoted in Kraft's brief (p. 16) thus holds that Stine's specific example provides a *modification* of the conventional holding room procedure of step 8 by allowing the surfaces of the cheese to dry during step 8. This finding not only fails to support Kraft's contention that the drying step was part of the conventional holding room procedure, but flatly contradicts Kraft's contention.

The next finding, also quoted in part by Kraft, Finding 55 (IV, 2860) holds that in the conventional Swiss procedure, during both the holding room period of step 8 and the curing period of step 9, the cheese, instead of being allowed to dry, is washed with brine two or three times a week. This finding (IV, 2860-1) mentions drying only as part of the procedure taught by the Stine patent and thus again contradicts Kraft's position.

The next finding cited by Kraft (IV, 2834) is an excerpt from the trial court's opinion quoted out of context. The opinion actually states that Stine's *modification* of the conventional process included holding the cheese in the holding room until dry. It directly contradicts Kraft's contention that this essential drying step was part of the conventional process.

The last findings cited by Kraft as supporting its contention that Stine's essential drying step was part of the conventional procedure, are Findings 57 to 60 (IV, 2861-2). These findings point out that Stine's respective claims refer to three steps: sealing, boxing, and curing, which distinguish Stine's process from the conventional process. Those findings simply confirm petitioners' statement that the Stine claims do not specify Stine's essential drying step. Nothing in those findings supports Kraft's contention that Stine's essential drying step was part of the conventional process of making uncured cheese of the Swiss type. Obviously, the drying step does not distinguish the claims because it is not recited in them.

As we noted at page 8 of the petition, all of the affirmed findings which purport to describe the process actually used by Stine and found to be his invention, refer to Stine's drying step as part of the Stine process found to be the invention. No reference whatever to this drying step can be found in the claims.

The unchallenged testimony of Kraft's witnesses flatly contradicts Kraft's contention that the drying step was part of the conventional procedure.

Stine testified (I, 201) that his patented improvement begins with "the drying of the block" and that such drying was not customary in the conventional process:

> "Q. Do you assert that your invention starts with the drying of the block, or does it start with the sealing of the block?
>
> "A. Well, we state that the block should be dried, which is true. We call for drying, or describe the drying operation. *Whereas, in the case of the*

*wheel, they do not as a rule attempt to dry that surface.** So I suppose you can say that we include the drying as part of the operation. It is a necessary portion, and it is mentioned in the patent as being necessary. And from there on is the portion covered.

"Q. Would you say that the drying of the block is an essential part of the operation of the method of your alleged invention?

"A. I think it is necessary if you are to get a good piece of cheese, yes."

Stine further admitted and asserted (I, 246, 331) that, unless the uncured cheese was sufficiently dried before sealing, the surface of the cured cheese would be rotten and malodorous, and admitted (III, 2206) that for his process the surfaces must, before sealing, be "dried sufficiently to be definitely dry to the touch" and not "feel damp on the surface". Kraft's plant manager Rausch testified to extensive experiments demonstrating that draining off the brine and allowing the surfaces to dry for days thereafter was not enough unless the surfaces were dried until really dry (III, 2048-50, 2053-5).

There can be no doubt that the claims made are broader than the invention and fail to define it by omitting the essential drying step. For that reason, they should have been held invalid under the applicable decisions of this Court and of the Circuit Courts of Appeals referred to in the petition. Kraft's brief does not question these authoritative holdings that a step which is essential to define an operative invention and is not included in the claim, cannot be read

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* Italics throughout ours unless otherwise stated.

into the claim to save it from invalidity, even if the step is described elsewhere in the patent.

As to Question 2:

Kraft's brief (p. 20) admits the findings of infringement referred to in Question 2 were made on the basis of the doctrine of "equivalents"; but asserts they were "made with full awareness of the Patent Office limitations", because Supplemental Findings A and B were incorporated in the same order of the trial court.

The answer is simple. Supplemental Finding A incorporates only what Kraft chose to admit in open court was not sealing within the meaning of the Stine claims. These admissions included only a part of what Kraft represented to the Patent Office (See petition, pp. 12-13) was not sealing within the meaning of the Stine claims. The scope of the admissions made to the Patent Office to secure the allowance of the claims (as distinguished from what Kraft chose to admit in open court was not sealing) was disregarded by both lower courts.

Kraft's brief (p. 24) argues that, because the courts gave effect to what Kraft admitted in open court was not sealing, they were not following the Second Circuit rule when they disregarded the broader scope of the Patent Office admissions, but were following the conflicting rule of the Third, Fifth, Sixth, and Tenth Circuits which hold that Patent Office admissions limit the scope of the claims for the purpose of determining infringement. Plainly, there is no merit in this Kraft argument.

Kraft notes (pp. 17, 18, of its brief) that the methods found to infringe as equivalents had been used only by Borden prior to the trial, and implies that the other petitioners are not interested in these methods. These methods, if held non-infringing, are available to all the petitioners and the public. For that reason, the other petitioners are just as much interested in this Question as Borden.

As to Reasons for Granting the Writ:

The petition points out that Swiss cheese manufacture is largely concentrated in the Seventh Circuit, and that there is no reasonable prospect that the Stine patent may be litigated in other circuits, if the present decision stands.

Kraft's brief (pp. 7, 21) seeks to suggest that there may be substantial Swiss cheese operations outside the Seventh Circuit by concerns sizable enough to oppose Kraft's patent in other circuits.

At page 7, Kraft's brief refers to the fact that some large companies, such as Armour & Co., Swift & Co., and Beatrice Foods Co., *distribute* "cheese". Kraft's brief is careful to refer only to cheese broadly, because the record references Kraft cites refer only to cheese broadly—not to Swiss cheese.

Kraft's brief does not deny that most of the Swiss cheese made in this country by others than Kraft is made by small independent cheese manufacturers or farmers' cooperatives, and not by companies large enough to challenge Kraft's patent. Kraft's brief (p. 7) suggests that a substantial amount of Swiss cheese is made in Ohio and that some is

made in Utah by others than Kraft. The record references cited for these statements merely show that one of the witnesses in 1939 was engaged in Swiss cheese manufacture in Ohio and in 1947 was engaged in Swiss cheese manufacture in Utah. There is no evidence of record as to the size of these operations or as to whether they are still in existence. Our information is that there are a few independent small Swiss cheese manufacturers in Ohio, mostly farmers' cooperatives, and that there is only one in Utah, also a farmers' cooperative organization.

Kraft's brief does not assert that any of these small enterprises has challenged Kraft's patent, nor that there is any reasonable prospect that any of them is strong enough to litigate the validity and scope of the patent in Ohio or Utah.

Kraft's brief (p. 8) admits Kraft refused to license Borden and has not licensed others. The record reference Kraft cited shows that what Kraft's President told Borden was that Kraft did not contemplate granting any licenses, because it could not make enough money out of licensing (II, 955-6).

Kraft's brief (p. 8) also admits that in 1946 Kraft made only about 6% of the Swiss cheese made in this country, but that in 1951 Kraft was making over 30%. According to the figures given in the trial court's opinion (IV, 2838) Kraft's proportion of the business had increased to over 40% in 1952. It seems very apparent that if this patent stands, Kraft's share of the Swiss cheese manufacture will not become any smaller during the next ten years.

Kraft's brief really confirms petitioners' position that there is no reasonable prospect of litigation on the Stine

patent outside the Seventh Circuit and that its validity is a matter of great importance to the Swiss cheese industry and to the dairy farmers dependent on that industry.

Except for the fallacious Kraft contentions as to Question 1 and Question 2 above discussed, Kraft's brief does not challenge the other reasons for granting the writ set forth in the petition.

As to the State's Interference Action:

Kraft's brief (pp. 4, 22) criticizes petitioner the State of Wisconsin, because, after the Stine patent issued, the State filed an application, copying the Stine claims, to start an interference in the Patent Office with the Stine patent, based on work the State, through its employee Honer, had done for the benefit of the public prior to Stine's invention. The State believed the Stine patent claims to be so broadly worded as to cover and deprive the Swiss cheese industry of the benefits of the State's earlier work. Kraft notes the State's action under 35 U. S. C. 146 to review the Patent Office ruling is still pending in Delaware.

The present petition raises no issues involved in that interference action which is concerned solely with priority of invention and not with the validity of the claims. The petitioners other than the State have nothing whatsoever to do with it.

Long ago, the State, through its responsible officials, publicly declared that, if it obtained a patent, such patent would be made freely available to all the dairy industries. The State, in instituting that interference, was not seeking

a monopoly such as Kraft presently asserts, but to protect the dairy industry dependent on the manufacture of Swiss cheese.

Conclusion:

The Kraft brief has advanced no sound reason why the writ of certiorari prayed for in the petition should not be granted.

Respectfully submitted,

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